

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 224 of the Act)	WC Docket No. 07-245
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	

COMMENTS OF CTIA—THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”),¹ pursuant to FCC Rule 1.429(f), 49 C.F.R. §1.429(f), respectfully submits this Opposition to the Petitions for Reconsideration submitted by the Florida Investor-Owned Electric Utilities (“Florida IOEUs”),² the Coalition of Concerned Utilities (“the Coalition”)³ and Oncor Electric Delivery Company LLC (“Oncor”)⁴ in this proceeding. CTIA members are pursuing deployment of facilities on utility poles throughout the country – and are encountering electric utility-imposed roadblocks that are impeding this deployment. Because the electric utilities’ petitions advocate further restrictions on their statutory obligation to accommodate new communications attachments on essential infrastructure – restrictions that contradict Section 224 of the Communications Act of 1934, as

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR, and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

² See Petition for Reconsideration and Request for Clarification of the Florida Investor-Owned Electric Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sept. 2, 2010) (“Florida IOEUs Petition”). The Florida IOEUs consisted of Florida Power & Light Co., Tampa Electric Co., Progress Energy Florida, Inc., Gulf Power Co. and Florida Public Utilities Co.

³ See Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sept. 2, 2010) (“Coalition Petition”). The Coalition consisted of Allegheny Power, Baltimore Gas and Electric Co., Dayton Power and Light Co., FirstEnergy Corp., National Grid, NSTAR, PPL Electric Utilities, South Dakota Electric Utilities and Wisconsin Public Service Company.

⁴ See Petition for Reconsideration and Request for Clarification of Oncor Electric Delivery Company LLC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sept. 2, 2010) (“Oncor Petition”).

amended,⁵ and will produce disproportionate harm to the deployment of wireless facilities – CTIA opposes the electric utility petitions. Likewise, because the May 20 *Order*⁶ does not specify that pole replacements are required to accommodate new attachments, which is compelled by the statute to ensure just, reasonable and non-discriminatory attachment, CTIA supports the reconsideration petition of the Cable Associations and Cable Operators.⁷

II. THE ELECTRIC UTILITY PETITIONS SHOULD BE DENIED

CTIA opposes the electric utility pole owners' petitions for reconsideration. In those petitions, the electric pole owners seek (A) to limit the use of attachment techniques to those used in the communications space and (B) Federal Communications Commission ("Commission" or "FCC") retraction of electric utilities' obligation to rearrange facilities in the electric space to accommodate communications attachments. The electric utility petitions are incorrect as a matter of law and would undermine the long-standing and hard-won principles of just, reasonable and non-discriminatory access to space on poles.⁸ They also are intended to shrink the cases in which electric utility pole owners are obliged to provide access to a tiny set of

⁵ 47 U.S.C. § 224.

⁶ See *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, GN Docket No. 09-51, FCC 10-84 (rel. May 20, 2010) ("May 20 *Order*").

⁷ See Petition for Reconsideration or Clarification of the Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association of Pennsylvania, Cable America Corporation, Cable Television Association of Georgia, Florida Cable Telecommunications Association, Inc., Mediacom Communications Corporation, New England Cable and Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sept. 2, 2010) ("Cable Petition").

⁸ See *Cavalier Tel. v. Va. Elec. & Power Co.*, Order, 15 FCC Rcd 9563 (Cab. Servs. Bur. 2000); *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (Enf. Bur. 2007); *Kansas City Cable Partners d/b/a Time Warner Cable Of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11,599 (Enf. Bur. 1999).

circumstances where the attachment can be accommodated only through make-ready in the communications space.⁹ CTIA urges the Commission to deny these petitions.

CTIA, moreover, supports the Petition for Reconsideration filed by the State Cable Associations and Cable Operators that asks the Commission to renew its prior requirement that just, reasonable and non-discriminatory pole access requires electric utilities to replace existing poles with taller ones to accommodate communications attachment requests. As set forth in Section II.B. *infra*, the Commission not only possesses ample statutory basis to take this action, but, indeed, is obliged to do so to fulfill its regulatory obligations under Section 224 and to bring the infrastructure elements of the National Broadband Plan¹⁰ to fruition.

A. Electric Utility Efforts To Limit Attachment Techniques and Make-Ready to The Communications Space Are Unjust, Unreasonable and Discriminatory.

Electric utility petitioners seek to curtail the Commission's already modest conclusion that "utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances."¹¹ In particular, the electric utility pole owners argue that to the extent an electric company employs certain space-saving attachment techniques in the upper, electric-space portion of the pole, it is not required to allow communications attachers to avail themselves of these techniques. The electric utilities, likewise, seek to extend these greater restrictions to poles that they jointly own with telephone companies, as well as to reserve the ability to adopt more restrictive approaches in the future.¹² If the electric companies use space-saving techniques in the electric space, similar techniques must be permitted for communications

⁹ The communications space, located at the bottom of the usable space and starting at the lowest point on the pole at which required ground clearances are met, represents less than 20 percent of the usable space on the pole and less than 10% of the total space on the pole.

¹⁰ Fed. Commc'ns Comm'n, National Broadband Plan 125-136 (2010), *available at* <http://www.broadband.gov/plan>.

¹¹ May 20 Order at ¶¶ 9-10.

¹² See Coalition Petition at 2.

attachers – whether the attachments are made in the communications space or elsewhere on the pole.

Second, the electric utility pole owners seek a dramatic expansion of the circumstances under which they can deny attachment requests through a re-definition and expansion of the subsection (f)(2) exceptions. Under the electric utilities' formulation, they would be permitted to deny attachment applications even if the new attachment could be accommodated merely by rearranging existing electric facilities on the pole.¹³ Far more sweeping than the first element on which the electric pole owners seek reconsideration, this second, radical proposal would remove the electric utilities' legal obligation to share infrastructure that has been found time and again to be essential facilities for modern communication.¹⁴ If granted, the practical impact would be profound, particularly on wireless deployments. For example, under the electric utilities' construction, the pole owners could refuse to rearrange their wires (let alone replace poles) in the electric space to make room for communications attachments. If they refused to move their electric facilities to accommodate a device in the communications space or at the pole-top, there simply would be no attachment option. And because there would be no legal requirement to arrange its facilities in the electric space, the electric pole owner could charge a monopoly premium for access and electric-space make-ready, assuming that it did not forbid access entirely. This, of course, would completely circumvent Congress's mandate that the

¹³ See Florida IOEUs Petition at 9.

¹⁴ See *Nat'l Cable Telecom. Ass'n v. Gulf Power*, 535 U.S. 327, 330 (cable companies have found it "essential[] to lease space for their cables on telephone and electric utility poles."); *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002) (pole-owning power companies are "the owner of . . . 'essential' facilities"); Amendment of Commission's Rules & Policies Governing Pole Attachments, 16 F.C.C.R. 12,103, 12,112, ¶ 13 (describing poles as "bottleneck facilities" and acknowledging "the utilities' monopoly over poles") (2001); see also *id.* at 12,166 n.254 ("[U]tility poles are often regarded as essential facilities.").

Commission have in place effective regulations to ensure that pole rates are to be just, reasonable and non-discriminatory.

B. Requiring Electric Utility Pole Owners To Replace Poles To Accommodate Attachment Requests That Cannot Be Accommodated Through Simple Make-Ready or Other Attachment Techniques Is Required By Section 224.

The expansion of the Section 224(f)(2) exception that the electric utilities seek through reconsideration is so large that it would swallow the controlling principle of Section 224 that the “rates, terms and conditions [of pole attachments] are just and reasonable.”¹⁵ This exception already is far too large given the Commission’s reluctance to rule in the May 20 *Order* that electric utilities must, on a non-discriminatory basis, replace poles to accommodate communications attachment requests.¹⁶

Since 1978, the statute commands that where a state has not opted to assert jurisdiction over pole attachments, “the Commission shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and reasonable . . . and shall prescribe by rule regulations to carry out the provision of this section.”¹⁷ As relevant here, the 1996 Telecommunications Act added a new “mandatory access” subsection 224(f), which requires that a pole owner “shall provide a cable television system or any telecommunications carrier with non-discriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it.”¹⁸ This mandatory access provision, however, contains a limited carve-out to allow a pole owner to deny access “on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”¹⁹

Thus, at its foundation, Section 224 requires utilities to provide just, reasonable and

¹⁵ 47 U.S.C. § 224(b)(1).

¹⁶ *See* May 20 *Order* at ¶ 16.

¹⁷ 47 U.S.C. §224(b)(1)-(2).

¹⁸ 47 U.S.C. § 224(f)(1).

¹⁹ 47 U.S.C. § 224(f)(2).

non-discriminatory access, subject to the very narrow and limited exception inserted at subsection (f)(2).

Critical to understanding just how far the electric utility petitioners would have the Commission stray from the text and the purpose of the statute is the elemental principle that there is an inherent imbalance in the negotiating leverage between the pole owner and the attacher,²⁰ even in cases where the pole owner is a relatively modest-sized electric utility, and the attacher is a large company. This principle animated the passage of the Act in 1978, the extension of it to certain telecommunications carriers, the mandatory access obligations set forth at subsection 224(f) and, indeed 32 years of FCC regulation.²¹

Generations of aerial (pole) plant operating field practices have established basic industry standards of reasonableness to allow for communications attachments on poles.²² These include rearranging facilities already attached, use of brackets and boxing, and, pole replacements.²³ The

²⁰ See, e.g., *Alabama Power Company v. FCC*, 311 F.3d 1357, 1362 (11th Cir. 2002) (“As the owner of ... ‘essential’ facilities, the power companies had superior bargaining power”).

²¹ See, e.g., *Southern Company v. FCC*, 293 F.3d 1339, 1341 (11th Cir. 2002) (“Ownership of the only facilities available gave the utilities a superior bargaining position when renting space to cable providers, and the Pole Attachments Act (passed in 1978) reflects Congress's decision to regulate this relationship.”).

²² See Pre-Filed Direct Testimony of Michael T. Harrelson, P.E., in *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, EB Docket No. 04-381, at 6-7, 10 (Mar. 31, 2006) (attached as Ex. 1 to Cable Petition) (explaining that pole replacement is “[s]tandard industry practice for electric utility companies” and that, “if a new attachment or existing attachments necessitate a change-out to an incrementally taller pole that [the utility] routinely uses and that is available from [the utility’s] inventory, that . . . is routine work”); see also Cable Petition at 9.

²³ See, e.g., *Fla. Cable Telecomms. Ass’n v. Gulf Power Co.*, ALJ Initial Decision, 22 FCC Rcd. 1997 ¶ 19 (“Such changes and rearrangements on poles are normal to accommodate new attachments.”); *id.* ¶ 22 & n.11 (stating that “correcting code violations and pole change-outs” are “normal and customary make-ready arrangements”); May 20 *Order* at ¶ 14 (“[A] pole does not have ‘insufficient capacity’ if it could accommodate an additional attachment using conventional methods of attachment that a utility uses in its own operations, such as boxing and bracketing.”).

Poles are manufactured and provisioned in five-foot increments, ranging in height from approximately 30 feet to up to 60 feet. See Cable Petition at 8; Deposition of Rex Brooks Senior Engineering Representative (Retired) in *Florida Cable Telecomms. Ass’n v. Gulf Power Co.*, EB Docket No. 04-381, at 48 (Sept. 16, 2005) (attached as Ex. 2 to Cable Petition). Pole replacements by utility personnel and aerial utility plant contractors is a routine practice.

Commission in the past has required that a utility must “take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs.”²⁴

That ruling, however, was reversed by the United States Court of Appeals for the Eleventh Circuit in *Southern Company v. FCC*, 293 F.3d 1339 (11th Cir. 2002). *Southern Company*, however, does not proscribe a rule requiring that utilities generally must replace poles to make room for communications attachers when the utility would do so for itself. That is so for two reasons. *First*, as the cable petitioners correctly point out, the *Southern Company* court limited its holding to “situations *where it is agreed* that capacity on a given pole or other facility is insufficient to accommodate a proposed attachment.”²⁵ Indeed, the court restated that limiting principle three separate times in its opinion.²⁶ Thus, where would-be communications attachers *agree* with the utility that a pole cannot be replaced—whether it be because of topographical or other constraints—the utility can rely on Section 224(f)(2) to refuse the attachment request.

Second, the *Southern Company* opinion is of limited reach because the court did not purport to analyze the “non-discriminatory basis” language of Section 224(f)(2). That makes a dispositive difference here. Section 224(f)(2), after all, does not merely provide that a utility can deny access “where there is insufficient capacity.” It provides, instead, that a utility can deny access “*on a non-discriminatory basis* where there is insufficient capacity.”²⁷ *Both* requirements must be met before a utility can deny access under the provision. And where a utility would have replaced a pole to meet its *own* needs, the first requirement is not met; clearly, the denial is

²⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, at ¶ 51 (rel. Oct. 26, 1999).

²⁵ *Id.* at 1346.

²⁶ *Id.* at 1346; *accord id.* at 1342 (“situations where it is agreed”); *id.* at 1347 (“Where it is agreed that capacity is insufficient, there is no obligation to provide third parties with access”)

²⁷ 47 U.S.C. § 224(f)(2) (emphasis added).

not “non-discriminatory.” Accordingly, the result under Section 224(f)(2) is different in instances where the would-be communications attacher can show that the utility is willing to replace poles to meet its own attachment requirements.

The facts facing the *Southern Company* court did not compel an analysis of how Section 224(f)(2) would apply in such a case. On the contrary, the court took care to point out that it was required to “construe statutes in such a way to ‘give effect, if possible, to every clause and word of a statute.’”²⁸ In a case where the utility was replacing poles for its own attachments needs but not those of communications attachers—*i.e.*, discriminating in favor of their own attachments—to hold that Section 224(f)(2) authorized the utility’s behavior would be to commit the interpretive sin *Southern Company* took pains to avoid. The “non-discriminatory basis” language would disappear entirely from the Act.²⁹ Clearly, the *Southern Company* court did not mean to read out of the Act the “non-discriminatory” requirement to allow an electric utility to treat itself differently than others.

In short, *Southern Company* does not prevent the Commission from adopting a rule requiring utilities to replace poles where needed for communications attachments if they would have done so for themselves. Nor would such a ruling leave Section 224(f)(2) a nullity, as utilities have claimed. For one thing, there would be situations (as described above) where attachers and utilities agree that the pole cannot be replaced. For another, a utility wishing to rely on Section 224(f)(2) to refuse pole replacement as a means to make room for new communications attachments could do so—so long as it was willing to impose the same

²⁸ 293 F.3d at 1346 (quoting *Williams v. Taylor*, 529 U.S. 362, 404 (2000)).

²⁹ The *Southern Company* court did reject a Commission *policy argument* to the effect that the Act’s nondiscrimination principle required a pole replacement requirement. *See id.* But that sensible holding says nothing about the “non-discriminatory basis” language of Section 224(f)(2), which the court never considered. It is one thing to say that a non-discrimination policy cannot limit a statute’s plain language; it is quite another to say that actual non-discrimination language in *the statute itself* cannot do so. The Eleventh Circuit never embraced the latter proposition.

limitation on itself. In that circumstance, both requirements of the statute would be fulfilled: there would be “insufficient capacity” and the utility would be acting on a “non-discriminatory basis.” Section 224(f)(2) would be quite viable, so long as utilities were willing to adhere to the non-discrimination principles at the core of the Act.

As the Commission recognizes, it has discretion to interpret ambiguous provisions of the Act, and it is reasonable to include pole change-outs within the ambit of non-discriminatory attachment techniques available to attachers under subsections 224(b) and (f)(1).³⁰ Of course, here, not only has “Congress delegated authority generally to make rules carrying the force of law,”³¹ but it has done so explicitly, providing: “The Commission shall prescribe by rule regulations to carry out the provisions of this section.”³²

Practically, and legally, pole replacement is not the different breed of cat that the electric utility pole owners portray. In most cases, it is no different than simple facilities rearrangements (make-ready) or the cost-saving attachment techniques that the Commission affirmed in the May 20 *Order*. To be sure, the replacement of an existing pole with a new, taller pole can be somewhat more involved than merely shifting wires or installing an extension bracket on an existing pole. Even so, it is a routine procedure performed hundreds, if not thousands, of times a day by electric utilities, and ultimately just another in a series of routine access accommodations that electric utilities execute regularly for themselves and others.³³

³⁰ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 553 U.S. 218, 226-27 (2001) (Deference is warranted “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

³¹ *Id.*

³² 47 U.S.C. § 224(b)(2).

³³ Other subsections of the Pole Act not only contemplate pole replacements, but acknowledge that the occurrence of pole replacements is sufficiently prevalent across the industry as to require statutory cost-allocation and accounting principles. 47 U.S.C. § 224(h) and (i).

Finally, the electric utility always will be compensated for the accommodations. If a pole needs to be replaced, and there is no other way – through facilities rearrangement or some other technique that the electric utility has allowed itself to use to accommodate the new attachment – then the communications party requesting the attachment assumes the financial responsibility for the pole replacement and the transfer of existing attachments from the old pole to the new pole.³⁴

III. CONCLUSION

The Commission is now confronting a situation where the narrow (f)(2) exception is poised to swallow the rule of just, reasonable and non-discriminatory access that animates the statute and 32 years of successful regulation. This change would have a profoundly negative impact on broadband deployment in the United States. Fortunately, however, the Commission stands on solid statutory ground to reject the electric utility petitions and limit the exception. It should conclude here that electric utility pole replacements are necessary to ensure just, reasonable and non-discriminatory pole access, and to close this growing loophole. For these reasons, CTIA respectfully requests that the Commission deny the petitions for reconsideration filed by the electric utility parties and grant the petition filed by the Cable Associations and Cable Operators in this proceeding.

³⁴ See *Fla. Cable Telecomms. Ass'n v. Gulf Power Co.*, ALJ Initial Decision, 22 FCC Rcd. 1997 ¶ 19 (“And [the utility] is never out of pocket because when a cable operator needs make-ready work to accommodate an attachment, the attacher pays the costs.”).

Respectfully Submitted,

/s/ *Brian M. Josef*

Brian M. Josef

Director, Regulatory Affairs

Michael Altschul

Senior Vice President and General Counsel

Christopher Guttman-McCabe

Vice President, Regulatory Affairs

CTIA-THE WIRELESS ASSOCIATION®

1400 Sixteenth Street, N.W., Suite 600

Washington, D.C. 20036

(202) 785-0081

November 1, 2010